

PUBLIC CONTRACTS REVIEW BOARD

Case No. 347

CT/3117/2010; UM/1389 NP

Title: Negotiated Procedure for the Supply, Deliver, Installation and Commissioning of a High Throughput DNA and RNA Analysis System to enhance the Health Biotechnology Facilities at the University of Malta

The closing date for this call for tenders was the 8th March 2011.

The original estimated value of this tender was €500,000 (inclusive of VAT) - Revised/Actual Value: €556,077.89 (inclusive of VAT).

Two (2) tenderers had originally submitted their offers.

Messrs Vivian Corporation Ltd filed an objection on 19th August 2011 against the decision of the Department of Contracts to disqualify its bid as administratively not compliant and to award the tender to Illumina Netherlands B.V.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Edwin Muscat and Mr Joseph Croker as members convened a meeting on Wednesday 11th November 2011 to discuss this objection

Vivian Corporation Ltd

Dr Jonathan De Maria	Legal Representative
Ms Joanna Cremona	Representative
Mr Gordon Zammit	Representative
Mr Yan Zammit	Representative
Ms Denise Borg Manche	Representative

Illumina Netherlands BV

Mr Stephen Debono	Representative
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University of Malta

Dr Charmaine Cristiano Grech	Legal Representative
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Evaluation Committee:

Dr Ing. Saviour Zammit	Chairman
Prof. Alex E Felice	Member
Dr Stephanie Bezzina Wettinger	Member
Dr Christian Scerri	Member
Mr Karm Saliba	Secretary

Department of Contracts

Mr Jonathan Barbara	Secretary General Contracts Committee
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After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objections.

Dr Jonathan De Maria, legal representative of Vivian Corporation, explained that his client was informed by the Contracts Department, through a letter dated 10th August 2011, that the company's offer was disqualified from this tendering process as it was found to be administratively not compliant for the following reasons:-

- a) *with regard to the principal deliveries effected, presented a list showing that the number deliveries was one (1) per year for the years 2007 - 2009 in lieu of the required two (2) deliveries per annum as a minimum for the years 2007-2009 and this in line with Article 6.1.2.(a) of the ITT,*
- b) *again with regard to the principal deliveries effected in the years 2007 - 2009, it was presented a list showing that the global value of deliveries effected in the detailed years amounted to € 102,270.09 thus averaging € 34,090.03 per annum which is rather very far away from the minimum of € 500,000.00 per annum as specifically requested in Article 6.1.2(a) of the ITT; and*
- c) *in the "List of principal deliveries" detailed that three (3) out of the four (4) deliveries mentioned, dealt with "equipment on loan" rather than equipment sold and delivered and one (1) delivery was not equipment as required.*

Technical Capacity

Dr De Maria made the following submissions:-

- i. Reg. 4 of the Public Procurement Regulations, which reflected the EU Procurement Directive, stated that:

"(1) Contracting authorities shall ensure that there is no discrimination between economic operators, and that all economic operators are treated equally and transparently in all calls for tenders whatever their estimated value";

- ii. with regard to the technical capacity, the provisions in the original call for tenders differed from those that featured in the negotiated procedure which now read as follows:

"Section 6.1.2

A list of principal deliveries effected during the years 2007, 2008 and 2009 (Volume 1, Section 4), with specific reference to deliveries within the European Union.

The minimum value of deliveries of a similar nature completed shall be not less than € 500,000 per annum.

The minimum number of deliveries of a similar scope/nature completed in the years 2007, 2008 and 2009 must be at least two (2) in number per year.

It is understood that:-

- *the above information is being requested by the Evaluation Committee for its own use and such information will not be divulged to third parties;*
 - *in so listing the end clients, the tenderer is giving his consent to the Evaluation Committee, so that the latter may, if it deems necessary, contact the relevant clients, with a view to obtain from them an opinion on the works provided to them, by the tenderer. The Evaluation Committee reserves the right to request additional documentation in respect of the deliveries listed;”*
- iii. the original tender document did not include the condition that tenderers had to present a minimum of €500,000 worth of deliveries per annum by way of technical capacity and, understandably so, because it was almost impossible for local suppliers to effect such an amount of deliveries on an annual basis since the demand on the local market was very limited for this particular type of equipment and, when that occurred, it was mostly on lease basis; and
- iv. this requirement was discriminatory to local suppliers *vis-a-vis* overseas suppliers.

Ms Joanne Cremona, also representing Vivian Corporation, remarked that she represented the third largest supplier to the Ministry of Health and their principals, *Roche*, were one of the largest diagnostic companies worldwide. She stated that they were unable to provide proof of annual deliveries amounting to €0.5m per annum given the limited local market.

Mr Karm Saliba, secretary of the adjudicating board, explained that:

- a. a negotiated procedure was considered as a new and distinct process from the original call for tenders in which amendments could be effected to the original specifications and conditions and the tenderers had the option either to retain their original bid or to present a fresh submission;
- b. the same clause 6.2.1 quoted by the appellant also provided that an *“economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator); and*

- c. as a consequence, the appellant company could have relied on the capacity of its principal, *Roche*, to provide the annual delivery requirements specified in the tender document.

Dr De Maria insisted that the provision at clause 6.2.1 was discriminatory because it represented a barrier that precluded his client, a local firm, from competing with overseas firms.

The Chairman, Public Contracts Review Board, remarked that, once the appellant company considered the provisions of clause 6.2.1 discriminatory, the said company could have raised the issue prior to the closing date of the tender which could have led to bringing the tendering process to a halt. He added that the appellant company could still raise this issue at this stage but such action was more appropriate at pre-tendering stage because, on the other hand, when the appellant company decided to participate then it was accepting the tender conditions.

Price

Dr De Maria made the following remarks:-

- i. his client's price quoted in respect of the original call for tenders and in respect of the negotiated procedure remained the same whereas the price quoted by the recommended tenderer changed to €471,252.45 (excl. VAT);
- ii. as per clause 3 of the 'tender form' the price had to be quoted including duties, VAT, other taxes and discounts and, once the recommended tenderer quoted the price excluding VAT, then Illumina's tender submission was not compliant with the tender conditions and should have been disqualified;
- iii. he asked if the VAT rate for this kind of equipment was uniform in all EU member states; and
- iv. he concluded that, once both bids were technically compliant, then the deciding factor was the price and his client's price was even cheaper by about €80,000.

Mr Saliba, under oath, gave the following evidence:-

- a. he confirmed that the appellant company's price remained constant both in the call for tenders and in the negotiated procedure and even the company's tender submission remained unchanged whereas the recommended tenderer increased the company's price because it had enhanced its bid;
- b. according to VAT legislation, once the product was going to be imported in Malta, then VAT was payable in Malta and, as a result, the same rate of VAT was applicable;
- c. albeit the estimated value of the contract was published in the first call for tenders yet it was not made public in the negotiated procedure. Nevertheless,

certain enhancements were introduced in the negotiated procedure to include technological developments to improve the product's output;

- d. the original budget was €423,728 excluding VAT (€00,000 incl. VAT) whereas the recommended offer emerging from the negotiated procedure amounted to €471,252 excluding VAT (€556,077.89 incl. VAT);
- e. the contracting authority then sought the approval of the Managing Authority - the Planning and Priorities Co-ordinating Department (PPCD) - to increase the budget allocation to cover the ineligible items (by way of enhancements) and, in fact, €56,077.90 were additionally allocated for this project out of the Contingency Component as per Planning and Priorities Co-ordinating Department approval dated 17th June 2011; and
- f. whilst the appellant company was disqualified at administrative stage as indicated in the evaluation report, yet, although the appellant company's evaluation should have stopped there, the adjudication board still went through the technical aspects of the said appellant company's submission and certain shortcomings were noted, such as, missing items of equipment.

Dr Ing. Saviour Zammit, chairman of the evaluation board, remarked that:-

- the appellant company was making an erroneous assumption by implying that its bid was technically compliant;
- on checking the price offered by the appellant company it turned out that it was, in fact, more expensive when taking into account certain items in respect of which the appellant company failed to include their price in its tender submission;
- the tender was drawn up in such a way that the contracting authority explained its requirements in detail and it was left up to the tenderers to propose their solutions in order to satisfy those requirements.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection dated 19th August 2011 and through the verbal submissions made during the hearing held on the 11th November 2011, had objected against the decision of the Department of Contracts to disqualify its bid as administratively not compliant and to award the tender to Illumina Netherlands B.V.;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) the appellant company was informed by the Contracts Department, through a letter dated 10th August 2011, that the company's offer was disqualified from this tendering process as it was found to be administratively not compliant, (b) with regard to the technical capacity, the provisions in the original call for tenders differed from those that featured in the negotiated procedure, (c) the original tender

document did not include the condition that tenderers had to present a minimum of €500,000 worth of deliveries per annum by way of technical capacity and, understandably so, because it was almost impossible for local suppliers to effect such an amount of deliveries on an annual basis since the demand on the local market was very limited for this particular type of equipment and, when that occurred, it was mostly on lease basis, (d) the requirement of a minimum of €500,000 worth of deliveries per annum by way of technical capacity was discriminatory to local suppliers *vis-a-vis* overseas suppliers, (e) albeit being the third largest supplier to the Ministry of Health as well as being the local representative of, *Roche*, one of the largest diagnostic companies worldwide, yet the appellant company was unable to provide proof of annual deliveries amounting to €05m per annum given the limited local market, (f) the appellant company's price quoted in respect of the original call for tenders and in respect of the negotiated procedure remained the same whereas the price quoted by the recommended tenderer changed to €471,252.45 (excl. VAT), (g) as per clause 3 of the 'tender form' the price had to be quoted including duties, VAT, other taxes and discounts and, once the recommended tenderer quoted the price excluding VAT, then *Illumina*'s tender submission was not compliant with the tender conditions and should have been disqualified and (h) once both bids were technically compliant then the deciding factor was the price and the appellant company's price was even cheaper by about €80,000;

- having considered the contracting authority's representative's submissions, namely that (a) a negotiated procedure was considered as a new and distinct process from the original call for tenders in which amendments could be effected to the original specifications and conditions and the tenderers had the option either to retain their original bid or to present a fresh submission, (b) clause 6.2.1 quoted by the appellant also provided that an "*economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them*", (c) the appellant company could have relied on the capacity of its principal, *Roche*, to provide the annual delivery requirements specified in the tender document, (d) it was being confirmed that the appellant company's price remained constant both in the call for tenders and in the negotiated procedure and even the company's tender submission remained unchanged whereas the recommended tenderer increased the company's price because it had enhanced its bid, (e) according to VAT legislation, once the product was going to be imported in Malta, then VAT was payable in Malta and, as a result, the same rate of VAT was applicable, (f) albeit the estimated value of the contract was published in the first call for tenders yet it was not made public in the negotiated procedure, (g) certain enhancements were introduced in the negotiated procedure to include technological developments to improve the product's output, (h) the original budget was €423,728 excluding VAT (€500,000 incl. VAT) whereas the recommended offer emerging from the negotiated procedure amounted to €471,252 excluding VAT (€556,077.89 incl. VAT), (i) the contracting authority sought the approval of the Managing Authority - the Planning and Priorities Co-ordinating Department (PPCD) - to increase the budget allocation to cover the ineligible items (by way of enhancements) and, in fact, €56,077.90 were additionally allocated for this project out of the Contingency Component as per Planning and Priorities Co-ordinating Department approval dated 17th June 2011, (j) whilst the appellant company was disqualified at administrative stage as indicated in the evaluation report, yet, although the appellant company's evaluation should have stopped there, the adjudication board still went through the technical aspects of the said appellant company's submission and certain shortcomings were noted, such as, missing items of equipment and (k) the

tender was drawn up in such a way that the contracting authority explained its requirements in detail and it was left up to the tenderers to propose their solutions in order to satisfy those requirements;

reached the following conclusions:

1. The Public Contracts Review Board concurs with the interpretation given by the contracting authority with regard to the scope behind a negotiated procedure. This Board agrees that a negotiated procedure is considered as a new and distinct process from an original call for tenders in which amendments can be effected to the original specifications and conditions with tenderers having the option either to retain the original bid or to present a fresh submission.
2. The Public Contracts Review Board feels that nothing precluded the appellant company from relying on the capacity of its foreign principal, *Roche*, to provide the annual delivery requirements specified in the tender document.
3. The Public Contracts Review Board opines that, once the appellant company considered the provisions of clause 6.2.1 discriminatory, the said company could have raised the issue prior to the closing date of the tender which could have led to bringing the tendering process to a halt. Furthermore, this Board also argues that when the appellant company decided to participate then it was accepting the tender conditions as they were and it is considered pointless contesting qualifying or operational parameters at this juncture.
4. The Public Contracts Review Board took cognizance of the issue raised by the appellant company with regard to price, namely that, whilst (a) its price remained constant both in the call for tenders and in the negotiated procedure and (b) the company's tender submission remained unchanged, the recommended tenderer increased the company's price because it had enhanced its bid. Following deliberation this Board concludes that, since this praxis is permissible within the context of a negotiated tender, then the claim made by the appellant company cannot but be considered as unfounded.
5. The Public Contracts Review Board remarks that, in view of the fact that the appellant company's submission was disqualified at the administrative stage, the adjudication board should have desisted from proceeding with the evaluation of the technical aspects of the said company's submission.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

23rd November 2011